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No. 00-836

In The

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. As a nonpartisan organization, the ACLU has never in its eighty year history taken a partisan position on any electoral contest and takes no such position on this presidential election. The ACLU has, however, frequently defended the right to full and fair participation in the electoral process because we recognize, as this Court has recognized, that the right to vote is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, as this Court has stated, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The fact that both sides in this dispute claim to be acting in furtherance of the right to vote and in support of fair electoral procedures is hardly unusual. But it is equally routine in our system of government for such disputes to be resolved through the judicial process. Because this case calls into question the propriety of that traditional judicial function, it raises issues of profound

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

importance. In our view, the resolution of those issues is likely to have an enduring impact on the electoral process even beyond the obviously enormous stakes of the current presidential contest. In particular, we are concerned that the theory of judicial review put forth by petitioner will unduly impair the ability of courts, both state and federal, to use their equitable powers in voting rights cases to craft effective remedies designed to preserve both the right to vote and the right to have one's vote counted. For that reason, the ACLU respectfully submits this *amicus* brief.

STATEMENT OF THE CASE

By this point, the facts of this case are well known to virtually everyone in the country and need not be repeated here at great length. On Tuesday, November 21st, the Florida Supreme Court ruled in a unanimous opinion that Florida's Secretary of State had erred, as a matter of state law, in categorically refusing to accept the results of any manual recounts submitted to her after the November 14th deadline that she had previously announced for the submission of all final vote tallies. *Palm Beach County Canvassing Board v. Harris*, Pet. App. 1a-38a.

The court noted in its opinion that Florida law created a conflicting set of statutory mandates. On the one hand, Fla. Stat. § 102.111 provides that any county returns that are not received by the Department of State by 5 p.m. on the seventh day following either a state or federal

election "shall be ignored."[2] On the other hand, Fla. Stat. § 102.112 also addresses the question of what to do if county returns are not received by the Department of State by 5 p.m. on the seventh day after the election but, in contrast to the mandatory language of § 102.111, states that "such returns *may* be ignored and the results on file at that time *may* be certified by the department." (Emphasis added.) The permissive nature of this sanction is underscored by the following subsection of § 102.112, which directs the Department of State to fine each county canvassing board member $200 "for each day such returns are late, the fine to be paid only from the board

[2] Subsection 1 of the statute reads in its entirety, as follows:

> (1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the results of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the County returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored and results shown by the returns on file shall be certified.

member's personal funds."[3] As the court below noted, that clock would never tick if late filings were subject to automatic rejection under § 102.111. Pet. App. 25a.

Adding to the confusion, Florida law provides that any candidate may submit a written request to the county canvassing board for a manual recount at any time "prior to the time the canvassing board certifies the results for the office being protested. . . . " Fla. Stat. § 102.166. Upon receiving such a request, a county canvassing board "may" authorize a sample recount by hand. The sample must include at least three precincts and one percent of the total votes cast for the candidate requesting the recount. If the result of the sample recount "indicates an error in the vote tabulation which could affect the outcome of the election," Fla. Stat. § 102.166(4)(b), the canvassing board is required to address the error in any one

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[3] Section 102.112 provides, in its relevant subsections, as follows:

> (1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.
>
> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds . . .

of three ways, including a full manual recount, Fla. Stat. § 102.166(5)(c). Section 102.166 does not, on its face, indicate when the manual recount must be finished. It is fair to assume, however, that the Legislature understood that manual recounts take time, as the facts of this case undeniably demonstrate.

Faced with this tangled web of conflicting laws, the Florida Supreme Court applied a series of well-established rules of statutory construction "in an effort to determine legislative intent." *Id.* at 24a. First, it held that a more specific statute takes precedence over a more general one. *Id.* In this case, the court concluded, that meant that the inflexible seven day deadline of § 102.111 had to give way to the more flexible procedures of § 102.112, which authorize the Department of State to fine county canvassing board members for filing late returns rather than rejecting the late returns themselves. Second, the court noted that a later statute generally takes precedence over an earlier one. *Id.* Here, § 102.111 was enacted in 1951 and § 102.112 was enacted in 1989. Third, the court ruled that enforcing the inflexible seven day deadline of § 102.111 would render it impossible ever to impose the daily fine for late returns that § 102.112 expressly contemplates, in violation of the interpretive canon that every provision of a statute must be assumed to have meaning and be given effect. *Id.* at 25a. Fourth, the court observed that strict adherence to the seven day deadline of § 102.111 would, in many instances, make it impossible to complete the manual recount that § 102.166 explicitly authorizes, in violation of the rule that related statutory provisions should be read harmoniously, whenever possible. *Id.* at 25a-26a. Finally, the court reiterated

its longstanding view that election laws should be "liberally construed in favor of the citizens' right to vote," given Florida's deep constitutional commitment to protecting the right of suffrage. *Id.* at 30a.

Because each of these traditional rules of statutory construction pointed in the same direction, the court determined that it could best effectuate the legislative intent expressed through these varied and apparently inconsistent provisions by extending the deadline for submitting the results of manual recounts until 5 p.m. on Sunday, November 26th.[4] *Id.* at 38a. In so doing, the court concluded, it would simultaneously respect the Legislature's recognition that a manual recount can help assure an accurate vote tally, guarantee that the manual recounts will not drag on indefinitely, allow adequate time for the post-certification contests that Florida law allows, and preserve the state's overriding interest in certifying its presidential electors by the federal deadline of December 12th.

The Florida Supreme Court is, of course, the ultimate arbiter of Florida state law. The question of whether it correctly interpreted what the Legislature intended is therefore not before this Court. Instead, what this Court must now decide is whether the decision below so fundamentally altered the rules of the election after it was held

[4] Within hours of this court-imposed deadline, the Florida Secretary of State declared Governor Bush the winner of Florida's presidential election by 537 votes. That certification is being contested by Vice President Gore in the Florida state courts.

that the decision cannot be sustained as a matter of federal law.

SUMMARY OF ARGUMENT

As a matter of principle, the ACLU wholeheartedly agrees with petitioner's assertion that the rules governing an election should be established before an election is held. That principle is embodied in basic notions of due process. And, in the case of presidential elections, it is codified in the provisions of 3 U.S.C. § 5, which was enacted by Congress in 1887 following the disputed election of Rutherford B. Hayes eleven years earlier. But, unlike petitioner, we do not believe that the rather standard exercise of statutory interpretation engaged in by the court below can or should be characterized in such apocalyptic terms.

Petitioner's assertion that the Florida Supreme Court usurped the constitutional authority of the state Legislature to direct the manner in which presidential electors shall be chosen ignores the fact that the Florida Legislature exercised that authority in this case by imposing a set of conflicting instructions. Presented with that conflict, the Florida Supreme Court did what courts in this country do every day: it attempted to reconcile the Legislature's conflicting instructions by applying neutral canons of statutory construction. Whether one agrees or disagrees with its result, that judicial undertaking cannot be regarded as a usurpation of the legislative role without calling into question every act of statutory construction. Trying to discern what the Legislature meant when it

crafted an ambiguous set of rules for choosing presidential electors is not the same as supplanting the Legislature in its constitutionally appointed task. Petitioner's claim that the decision below conflicts with the constitutional allocation of power set forth in Article II, Section 1, Clause 2, is therefore without merit.

Likewise, petitioner's contention that the decision below violates due process, in general, or 3 U.S.C. § 5, in particular, cannot withstand scrutiny. Petitioner repeatedly invokes 3 U.S.C. § 5 for the proposition that the selection of presidential electors must be based on law "enacted prior to" election day. As noted above, we do not quarrel with that proposition in the abstract. It is not, however, what the statute actually provides. Read in its entirety, 3 U.S.C. § 5 addresses the process for resolving "any controversy or contest concerning the appointment" of presidential electors. Based on the language of the statute, it is the state's dispute resolution process, "by judicial or other methods or procedures," that must be in place before the election is held, and that must be completed six days before the electors will meet to choose the next president. Florida's decision to commit electoral disputes to the courts for judicial resolution was in place long before this election was held, and it is difficult to see how following that established process in this case can lead to a violation of 3 U.S.C. § 5.

Petitioner's argument also mischaracterizes the process of judicial interpretation. Whatever 3 U.S.C. § 5 does or does not require – and like everyone else, we recognize that we are dealing with a statute that has rarely been cited, much less authoritatively construed – we readily acknowledge that due process places some constraints on

the ability of either the legislative or judicial branches to apply new substantive rules to an election that has already been completed. A court that resolves the ambiguity in preexisting rules, however, is engaged in a very different enterprise. As this Court has explained, "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (footnote omitted). The decision below undeniably construed Florida's existing election code but, contrary to petitioner's view, that is not the equivalent of creating a new code from whole cloth.

Finally, it is important to note that Florida is not the only state in the nation with an ambiguous election code nor has this been the only closely contested election in our nation's history. The combination of those two facts frequently places courts in the position of refereeing election disputes in an effort to determine the will of the voters. Properly understood, that process is not an impediment to fair elections, it is a guarantee of them. Yet, courts cannot be expected to perform that role if they are stripped of the tools they have traditionally employed to discern legislative intent and then enforce that intent through appropriate remedies. Other than being in the glare of a presidential election, what the Florida Supreme Court did in this case is not that unusual. If that decision-making process is now called into question, the role of the courts as a guardian of voting rights is likely to diminish.

ARGUMENT

I. THE DECISION BELOW INTERPRETING FLORIDA'S ELECTION LAW DOES NOT IMPROPERLY USURP THE POWER OF THE LEGISLATURE TO DETERMINE THE MANNER IN WHICH THE STATE SELECTS ITS PRESIDENTIAL ELECTORS

Article II of the Constitution undeniably assigns to each state legislature the power to determine the manner in which its presidential electors will be selected.[5] It is equally undeniable that the Florida Legislature has exercised that constitutionally assigned power by enacting a comprehensive election code that includes, among other things, a mechanism for judicial review of election protests (before certification of the election results) and election contests (after certification of the election results).[6] Pursuant to that legislative grant of authority, the Florida Supreme Court has now determined that the provisions of the election code at issue in this case are neither clear nor internally consistent. This Court is bound by that state court judgment, which involves a pure matter of state law. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569 (1941). By endeavoring to resolve the conflicts in state

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[5] Specifically, Article II, Section 1, Clause 2 provides, in full:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[6] The relevant provisions of the election code are codified in Fla. Stat. § 97-106, and described in the decision below.

law, the Florida Supreme Court was not usurping the legislature's role; it was, instead, attempting to reconcile the various expressions of legislative intent in a way that respected both the will of the Legislature and the will of the voters. It would be an odd conclusion, indeed, to hold that the Florida Supreme Court was constitutionally compelled to leave Florida's election law in the muddle it found it. We do not believe that the language of Article II, Section 1, Clause 2 should be read to produce such an awkward result.

The decision by the framers to allow each state legislature to determine the method of selecting its presidential electors was a compromise, like so many other decisions at the Philadelphia Convention. But the competing positions had little to do with the respective roles of the legislative and judicial branches within a given state. Instead, the focus of the debate, typically enough, was on whether the new national government should set uniform standards for the election of its chief executive officer and, if so, what those standards should be. Thus, the Convention considered and rejected proposals to have the president elected by "the citizens of the United States," by the "people," by "electors to be chosen by the people of the several states," or by "electors appointed for that purpose by the legislatures of the states." *McPherson v. Blacker*, 146 U.S. 1, 28 (1892).

The dispute was described by James Wilson as one that "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide." 2 M. Farrand, *The Records of the Federal Constitutional Convention* 501 (New

Haven: rev. ed. 1937). In the end, of course, the Convention chose to give each state latitude to choose its electors as it saw fit and, at least in the early days of the Republic, that latitude produced a variety of different electoral schemes. *See McPherson v. Blacker,* 146 U.S. at 29-34.

Although the power given to the states in this regard has often been described as plenary, it is not absolute. As this Court explained in *Williams v. Rhodes,* 393 U.S. 23, 29 (1968), "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution." For example, states may not choose a scheme for selecting presidential electors that discriminates against third party candidates, *Williams v. Rhodes, supra; Anderson v. Celebrezze,* 460 U.S. 780, 795 n.18 (1983), or that attempts to dictate whom the parties must seat as delegates to their nominating conventions. *Democratic Party v. LaFollette,* 450 U.S. 107, 126 (1981); *Cousins v. Wigoda,* 419 U.S. 477, 495 (1975).

Were we writing on a clean slate, we would urge this Court to hold that the right of the judiciary to decide what its state election laws mean and how they should be applied in particular circumstances is another important limitation on the otherwise unfettered power of the state legislature to choose a method for selecting presidential electors. In the classic words of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803):

> It is emphatically the duty and province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts much decide on the operation of each.

However, it is not necessary for the Court to go that far in this case because the Florida Legislature has already invited the judiciary into the process by authorizing the courts to resolve electoral disputes that arise both before and after certification. Surely, there is no reason to believe that the Florida Legislature intended the courts to resolve those disputes without first determining the meaning of the law that the courts have been asked to apply, including which law controls if two or more laws are in conflict. At the very least, it would be wrong to presume such a design on the part of the Legislature without a clear statement of its intent (which would then have to be tested against constitutional norms) to dramatically curtail the traditional prerogatives of a coordinate branch of the state government. *Cf. Webster v. Doe,* 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear").[7] Absent such a clear statement, the decision by the Florida Supreme Court to exercise its traditional powers of statutory construction pursuant to a specific jurisdictional grant of authority by the Florida

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[7] The fact that the current Legislature apparently disagrees with the particular decision of the Florida Supreme Court that is now under review is legally irrelevant. Were the rule otherwise, a legislative body could always respond to disappointing decisions by retroactively stripping the courts of jurisdiction to hear the dispute. *See Plaut v. Spendthrift Farms,* 514 U.S. 211 (1995) (legislature may not interfere with final court judgments).

Legislature to resolve election disputes cannot plausibly be construed as a usurpation of the legislative role. Suppose, for example, that the Florida Legislature had enacted two statutes. One provided that the counties had to submit their vote tallies to the state within seven days in all statewide elections. The other provided that the counties had ten days to submit their vote tallies to the state in presidential elections. If a challenge was brought to the vote tally submitted in a presidential election by a Florida county on the eighth day, it is absurd to suggest that the courts would be barred from deciding which statute takes precedence, especially if the court reached that result by applying well-established rules of statutory construction.

That is all that the Florida Supreme Court has done in this case. It did so, moreover, in a carefully crafted decision that began and ended its legal discussion with a reference to legislative intent as the guiding "polestar." This Court engages in a similar exercise on a routine basis when it fills in the interstices of federal law by deciding, for example, whether Congress intended to create an implied right of action, *see Cort v. Ash*, 422 U.S. 66 (1975), or when it interprets the appropriate scope of an ambiguous federal statute. *E.g., Bailey v. United States*, 516 U.S. 137 (1995) (holding that federal statute imposing additional penalties for "use" of a firearm during drug offense requires more than evidence of simple possession).

In short, the Florida Supreme Court did not substitute its judgment for the judgment of the Legislature; it did its best to divine what the Legislature intended when it enacted each of the provisions of this complex election code. Nothing in Article II, Section 1, Clause 2 renders

that undertaking illegitimate. To the contrary, by giving force and effect to the Legislature's intent as authoritatively construed by the Florida Supreme Court, the decision below does far more to promote the constitutional scheme of selecting presidential electors than to undermine it.

II. THE DECISION BELOW DID NOT CREATE THE SORT OF NEW RULE THAT CANNOT BE IMPOSED ONCE THE ELECTION IS OVER

Petitioner's second argument, as we understand it from the petition for *certiorari*, proceeds as follows. Even if the decision below did not usurp the legislature's constitutionally assigned function of choosing the method for selecting presidential electors, the act of statutory interpretation engaged in by the Florida Supreme Court nonetheless announced a new rule for manual recounts that was then applied to a completed election in violation of 3 U.S.C. § 5 and, perhaps, due process as well.

In support of this claim, petitioner repeatedly highlights a portion of 3 U.S.C. § 5 that refers to "laws enacted prior to the day fixed for the appointment of the electors," which federal law sets as Election Day. *See* 3 U.S.C. § 1 (designating Election Day as the "time of appointing electors"). Read in its entirety, however, 3 U.S.C. § 5 has less to do with setting the rules for the election than with establishing in advance a procedure for resolving election disputes. To begin with, the section is entitled: "Determination of controversy as to appointment of electors."

And, while a statute's title is not dispositive of its meaning, the text in this case in fact mirrors the title. It provides:

> If any state shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, *by judicial or other methods or procedures*, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

(Emphasis added.)

As previously described, Florida had in place before Election Day a procedure for resolving election controversies that might arise after Election Day. That procedure contemplated exactly what took place here – namely, the filing of election challenges in the appropriate state court with an ultimate appeal to the Florida Supreme Court. To the best of our knowledge, that procedure was not altered in any way, either in this case or in any of the other myriad challenges that were filed. Indeed, if 3 U.S.C. § 5 has any relevance at all, it appears on its face to foreclose petitioner's claim rather than support it since the statute indicates that any election dispute that is resolved by the state courts pursuant to

pre-existing procedures at least six days prior to the date that the Electoral College is scheduled to meet on December 18th "shall be conclusive."

More fundamentally, the notion that courts create new rules when they attempt to harmonize existing statutory provisions, as the Florida Supreme Court did in this case, or when courts attempt to discern the legislative meaning behind an ambiguous enactment, as the Florida Supreme Court also did in this case, misconstrues the nature of the judicial process. The Court addressed this issue directly in *Rivers v. Roadway Express*, 511 U.S. 298, when it considered the impact of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, on its earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Relying on the fact that their lawsuit was filed before this Court's decision in *Patterson* was announced, the plaintiffs in *Rivers* had argued that the 1991 Act merely restored the law to what it had been prior to *Patterson* and thus did not raise any retroactivity questions. This Court disagreed. Writing for the majority, Justice Stevens asserted:

> [I]t is not accurate to say that the Court's decision in *Patterson* "changed" the law that previously prevailed in the Sixth Circuit when the case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Court of Appeals had misinterpreted the will of the enacting Congress.

Id. at 313 n.12 (emphasis in original). It is because a judicial decision authoritatively construing an existing statute does not make new law that it is presumed to

apply retroactively, *Harper v. Dep't of Taxation*, 509 U.S. 86, 97 (1993). By contrast, a statute enacted by the legislature is presumed to apply prospectively precisely because it does make new law, by definition, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

This would undoubtedly be a more difficult case if the Florida Supreme Court had adopted a new set of election rules untethered to any existing statutory scheme. Under those circumstances, serious questions of First Amendment due process might well arise. *See generally*, Monaghan, "First Amendment 'Due Process,'" 83 Harv.L.Rev. 518 (1970). But the Florida Supreme Court was plainly not acting in a statutory vacuum when it attempted to make sense of the conflicting state laws governing manual recounts and establishing the operative dates for filing certified returns. Like this Court's decision in *Patterson*, the Florida Supreme Court's holding that the more recent and more specific provisions of § 102.112 are controlling did not make new law; it merely clarified what the law had been since § 102.112 was enacted in 1989, even if there had been no prior occasion to say so.

The logical extension of petitioner's argument is that courts could never decide issues of first impression in the context of election disputes. If adopted, that rule would be far more novel than anything the Florida Supreme Court did in this case. Indeed, the fact that this dispute has apparently presented an issue of first impression under Florida law weakens, not strengthens, petitioner's unfairness claim. In *Patterson*, the Court found no cognizable reliance interest despite acknowledging that its interpretation of 42 U.S.C. § 1981 was directly at odds

with the prior holdings of several appellate courts. Those decisions, the Court said, were simply incorrect and entitled to no weight. *Rivers*, 511 U.S. at 313.

If, as we believe, the Florida Supreme Court's decision to give precedence to § 102.112 over § 102.111 did not create a new legal standard in violation of either due process or 3 U.S.C. § 5, then petitioner is reduced to arguing that the court below erred by imposing its own deadline for the filing of an amended certification. It is true that the court's choice of 5 p.m. on Sunday, November 26th, as the final deadline for the filing of amended certifications cannot be found in any pre-existing statute. But the argument that the adoption of a judicially imposed deadline was therefore improper as a *post hoc* rule is unpersuasive for at least two reasons.

First, the failure to adopt a filing deadline for amended certifications under § 102.112 would have jeopardized the ability to carry out the post-certification contests that the Legislature clearly contemplated within the time set by federal law for designating the state's presidential electors. The November 26th deadline set by the court was thus part and parcel of its effort to reconcile the conflicting mandates imposed by the Legislature, and to determine how best to effectuate legislative intent under the unique and daunting circumstances of the present controversy.

Second, the role of the legislature is to determine the rules of the electoral contest. The role of the courts is to fashion an appropriate remedy once those rules are violated. Here, the Florida Supreme Court determined that the rules of the electoral contest established by the Florida

Legislature permitted manual recounts. Having reached that judgment, it acted well within its equitable discretion in permitting a window of opportunity to allow those recounts to go forward in an effort to achieve a more accurate assessment of the will of the voters. As detailed below, the exercise of that equitable discretion is critical to the ability of courts to serve as impartial referees in electoral contests around the country and, by performing that function, to preserve the right of every citizen to full and fair participation in the electoral process.

III. COURTS HAVE BROAD EQUITABLE POWERS IN RESOLVING ELECTION DISPUTES

Courts have traditionally exercised broad equitable powers in resolving election disputes to insure that the election process proceeds in a timely and reliable manner, and that voters are not disfranchised. The right to vote is fundamental. For that reason the equitable and remedial powers of a court are particularly broad in this area of the law. A ruling that the Florida state court lacked power in the exercise of its remedial authority to resolve conflicting provisions of state law, or to provide for contingencies not expressly anticipated or foreseen by state law, would lead to inequitable results, would needlessly disfranchise thousands of state voters, and would be contrary to the long established practice of the courts in voting rights cases.[8]

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[8] Aside from whether the Florida Supreme Court acted in conformity with 3 U.S.C. § 5, there can be no serious contention that the court abused the exercise of its equitable powers on other grounds.

A. The Right to Vote In a Fair and Reliable Election and to Have One's Vote Counted Are Constitutionally Protected

As the Florida courts have recognized, "federal and state constitutions guarantee the right of the people to take an active part in the . . . election process." *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975). *See also In Re: The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170, 1173 (Fla. 3d D.C.A. 1998) ("the right to vote . . . is assured every citizen by the United States Constitution"), *rev. den'd*, 725 So.2d 1108 (Fla. 1998). The right to vote is entitled to special constitutional protection because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights." *Reynolds v. Sims*, 377 U.S. at 562.

The constitutionally protected right to vote is not limited to the simple act of putting a ballot in a box. In *United States v. Classic*, 313 U.S. 299, 315 (1941), the Court held that "included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted." *Accord*, *Reynolds v. Sims*, 377 U.S. at 554 ("[i]t has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted") (citations omitted). In order to safeguard the right of voters to have their votes counted, the Court has held that ballots may not be destroyed or adulterated, *United States v. Classic*, 313 U.S. at 299, diluted by stuffing the ballot box, *Ex parte Siebold*, 100 U.S. 371 (1880), *United States v. Saylor*, 322 U.S. 385 (1944), diluted or debased through use of white primaries or white private political

clubs, *Smith v. Allwright*, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461 (1953), nor diluted through the use of a "blanket" primary, *California Democratic Party v. Jones*, 120 S.Ct. 2402, 2412 (2000) (the state scheme "adulterate[d]" a political party's candidate selection process "by opening it up to persons wholly unaffiliated with the party").

It would be a complete anomaly to hold that the protections of the state and federal constitutions did not apply to the most important elections conducted in the United States, those for the president. The legitimacy of elected office, including the presidency, and indeed the democratic system itself, depends upon the reliability of the electoral process.

B. A Court of Equity Has the Power and Duty to Grant Relief

As this Court has long noted, "there is inherent in the courts of equity a jurisdiction to . . . give effect to the policy of the Legislature." *Clark v. Smith* [38 U.S. 195], 13 Pet. 195, 203 (1839). *See also Mitchell v. De Mario Jewelry*, 361 U.S. 288, 292 (1960) (noting "the historic power of equity to provide complete relief in light of the statutory purposes").

Because of the overriding importance of equal voting rights, the remedial powers of the courts are particularly broad in cases involving the exercise of the franchise. The courts have, for example, enjoined and set aside the results of elections held in violation of the law, *Hamer v. Campbell*, 358 F.2d 215, 221 (5th Cir. 1966) (emphasizing "the broad equitable powers of the District Court to

mould relief"), *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("[i]f affirmative relief is essential, the Court has the power and should employ it"), ordered new elections, *Hadnott v. Amos*, 394 U.S. 358, 367 (1969), enjoined prosecutions, *United States v. Wood*, 295 F.2d 772, 785 (5th Cir. 1961), frozen voter qualifications, *United States v. Duke*, 332 F.2d 759, 769 (5th Cir. 1964), ordered excluded minorities placed on the registration rolls, *Alabama v. United States*, 304 F.2d 583, 591 (5th Cir. 1961) ("[t]he aim of equity is to adopt judicial power to the needs of the situation"), and issued injunctions against economic coercion and intimidation of voters, *United States v. Beaty*, 288 F.2d 653, 657 (6th Cir. 1961).

Courts have also routinely exercised their equitable powers in fashioning remedies for voting rights violations in the absence of any, let alone conflicting, state law remedy provisions. In *Emery v. Hunt*, CIV 00-3008 (D.S.D. 2000), for example, plaintiffs challenged a 1996 redistricting plan for the South Dakota house of representatives on the grounds that it violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and that it had been enacted in violation of the state constitution which prohibited interstitial redistricting. The federal court certified the state law issue to the state supreme court which ruled on July 26, 2000 – several weeks *after* the June primary – that the 1996 plan had been enacted in violation of the state constitution and that the only lawful plan under state law was the plan first enacted after the census in 1991. *See In the Matter of the Certification of a Question of Law from the United States District Court*, 2000 SD 97. There was, however, no state law providing for a remedy where a primary had been held under a plan later found by a court

to be unconstitutional.[9] The absence of a state law remedy is hardly surprising since the legislature could not have reasonably foreseen that it would adopt a plan that violated the state constitution. The district court, after considering various proposals submitted by the parties, and despite the absence of state law providing for such a remedy, ordered that a new primary election be held in September prior to the November general election. *See Emery v. Hunt*, Order of August 10, 2000, a copy of which is included in the appendix to the brief at 1a. Any contention that the district court in *Emery* lacked inherent power to fashion a remedy under the particular facts of that case would be wholly inconsistent with this Court's repeated admonitions that courts must insure that elections go forward in a "timely fashion" and that voters have a fair opportunity to elect a governing body that properly represents them. *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. at 586); *Connor v. Finch*, 431 U.S. 407, 426 (1977). State courts are no less obligated to fashion remedies, as the Florida court did here, that provide voters the fair opportunity to choose their elected officials.

Alden v. Board of Commissioners of Rosebud County, Montana, CV 99-148-BLG-DWM (D.Mont. 2000), is another example of a court's filling in the spaces or gaps in state law to remedy a violation of the law in order to allow elections to proceed in a timely manner. Shortly before the scheduled 2000 primary for the Rosebud

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[9] State law provided a method for filling vacancies following a primary election only where the vacancy occurred "by reason of death or withdrawal." SDCL 12-6-56.

County Commission, the district court found that the existing at-large system of elections violated Section 2 of the Voting Rights Act. Since there were fewer than 75 days between the date of the court order and the scheduled primary, the court concluded that a primary under a new plan could not be held in conformity with state law. Accordingly, it enjoined the primary and directed that a special general election be held in November 2000. Political parties were allowed to nominate candidates and independents were allowed to file petitions for a place on the ballot. *Alden v. Board of Commissioners of Rosebud County, Montana*, Order of May 10, 2000, a copy of which is included in the appendix at 8a. As in *Emery*, the district court in *Alden* acted in light of clearly established equitable principles in fashioning a remedy to allow the election to proceed in an orderly manner so that voters would have a fair opportunity to elect officials that properly represented them.

The Florida Supreme Court, in resolving the conflicts in state statutory law and setting a deadline for acceptance of amended certifications by the Secretary of State and the Elections Canvassing Commission, was acting in light of well recognized principles of equity. To conclude that the court acted beyond its powers would result in the disfranchisement of voters whose votes were not counted by the voting machines and render the court impotent in remedying election disputes. Nothing in federal or state law should countenance such an implausible result or be deemed to preclude the judicial branch from crafting appropriate, narrowly tailored remedies to safeguard the

right to vote, even (and perhaps most especially) in a presidential contest.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STEVEN C. EMERY, ROCKY LE COMPTE, and JAMES PICOTTE, Plaintiffs, -vs- ROGER HUNT, in his official capacity as Speaker of the South Dakota House of Representatives, et al., Defendants.	*	CIV 00-3008 ORDER
UNITED STATES OF AMERICA, Plaintiff, -vs- STATE OF SOUTH DAKOTA, WILLIAM J. JANKLOW, in his official capacity as Governor of the State of South Dakota, et al., Defendants.	*	CIV 00-3015 (Filed Aug. 10, 2000)

The United States of America and certain individual plaintiffs filed actions in this court, challenging the action of the South Dakota Legislature in 1996 which action abolished Legislative Districts 28A and 28B. The Court ordered these two cases consolidated. Plaintiffs sought to enforce the Voting Rights Act of 1965, 42 U.S.C. § 1973,

seeking declaratory and injunctive relief against continued use of the 1996 redistricting plan on the ground that it dilutes the voting strength of Native Americans.

Defendants filed various motions to dismiss, largely on the basis of laches and claimed general equitable principles based upon delay in waiting until 2000 to bring this action to challenge what was done by the South Dakota Legislature in 1996. The defendants further contended that the 1991 redistricting plan was in violation of the United States Constitution so that the 1996 action was required to remedy what was done in 1991. Plaintiffs subsequently sought a preliminary injunction, claiming the 1996 redistricting plan was in violation of Article III, Section 5, of the Constitution of the State of South Dakota. This Court certified the State constitutional question to the South Dakota Supreme Court. On July 26, 2000, acting in a most expeditious and helpful manner, the South Dakota Supreme Court answered the question by determining that the 1996 action of the South Dakota Legislature, which attempted to abolish House Districts 28A and 28B, was in violation of the South Dakota Constitution which allows redistricting only every ten years and at no other time. The legislative action of redistricting in 1996 is therefore a nullity and House Districts 28A and 28B as established in 1991 are the proper House legislative districts in question. *See In the Matter of the Certification of a Question of Law from the United States District Court*, 2000 SD 97. It is now clear that the results of the primary election already conducted in what was claimed to be House District 28 should be vacated and held for naught. The parties argue about what this Court

should now do and the Court has carefully examined all such proposals and objections.

Other motions must first be examined. The various motions to dismiss (Docs. 6, 45, 56, 58, 59, and 87-2) should all be denied. Two motions (Docs. 25 and 27) for a preliminary injunction should be denied as moot. Other motions, including a motion for partial summary judgment (Doc. 54), a motion in limine as to evidence of claimed legislative motives based upon testimony by those involved in the legislative process (Doc. 82) and a motion by the state defendants for a continuance of the trial date (Doc. 87-1) should all be denied as moot. Motions to quash certain subpoenas (Doc. 89 and 93) should be granted. The previous Order (Doc. 79) setting this case for trial should also be vacated since the trial will not be conducted. Finally, the state defendants filed a motion (Doc. 103-3) to dismiss the claims under the Voting Rights Act of 1965 as moot. Such motion should be granted, given the fact that the defendants have now apparently accepted the final decision of the South Dakota Supreme Court and have determined to not seek a rehearing within the twenty day period permitted by SDCL 15-30-4.

The State defendants filed a motion (Doc. 103-1) which motion should be denied as moot, given the fact the State defendants have filed a revised motion (Doc. 105) seeking to have this Court implement the decision of the South Dakota Supreme Court. The State defendants propose two possible alternatives. The first would call for special primary elections in House Districts 28A and 28B. The second would omit the primary elections and order a general election which would allow independents and

any member of a recognized political party, based upon obtaining sufficient signatures on a nominating petition, to run for the office of State Representative on the general election ballot. Under the second proposal, there would be no nominations of party candidates. The candidate in each district obtaining a plurality of votes on November 7, 2000, would be declared elected. Corson and Zieback Counties filed a motion (Doc. 110) which, in effect, urges the Court to adopt the State defendants' second proposal. The motion is captioned, however, in a fashion to suggest that leave of court is sought to join the state defendants' proposal. Leave is not required to allow the two counties to state their position and the motion will be construed as asking the Court to adopt the proposal of the State defendants which would negate the use of a primary election. The motion, in any event, should be denied for reasons which follow.

The United States filed a motion (Doc. 107) seeking to apply SDCL 12-6-56, thus foregoing any primary election and allowing county political committees to select candidates. This statute is not applicable. No vacancy has occurred "by reason of death or withdrawal after a primary election" and the Court should decline to apply the statute. The motion should be denied. Federal courts should encourage selection of candidates for public office by the registered voters in an election. What the United States urges here would undermine the process of selection of candidates in primary elections and return these districts in 2000 to methods used before the George S. McGovern national reforms. The so-called Emery plaintiffs have proposed the same remedy as sought by the United States (Doc. 104) and such proposal should also be

rejected for the reasons stated. It is indeed unfortunate that unconstitutional action by the South Dakota Legislature has caused and will cause additional election expenses in the affected counties, up to $6,000 in Corson County alone. It is even more unfortunate that such unconstitutional action has caused and will cause great confusion and inconvenience to the voters in that part of our State. This Court, however, is without power to remedy these problems and expenses, especially when the affected counties have filed no cross claim of any kind against the State. Perhaps the 2001 Legislature will recognize what the State has caused (acting even in opposition to legal advice from the Legislative Research Council) as to county expenses and reimburse the affected counties for these expenses. The Legislature may also find, of course, that these same counties were asking the Legislature to do exactly what was done in 1996 and "made their own bed."

The proposal by the State defendants and some of the counties to only conduct a general election should be rejected. It would, in effect, allow Republicans to select among several Democratic candidates for the same office and Democrats to select among several Republican candidates for the same office, much akin to the open primary system struck down in *California Democratic Party v. Jones*, 120 S.Ct. 2402 (2000). While the cited case is not directly on point, to do what the State alternatively urges would violate the "spirit" of the Supreme Court case. This Court has broad discretion in fashioning remedies in cases such as this. This Court will not permit voters registered in one political party to intervene with the selection of candidates from another party. This Court likewise rejects the

argument that primary elections, if now ordered, would violate the Voting Rights Act.

The Court determines that a portion of the revised motion of the State defendants (Doc. 105-2(a)) should be granted and special primary elections should be ordered with the dates as provided in Exhibit A to Doc. 105, namely the "revised District 28A and 28B special primary election calendar."

Remaining issues include attorney fees and costs to be awarded to plaintiffs. Now, therefore:

IT IS ORDERED:

1. Defendants' motions to dismiss (Docs. 6, 45, 56, 58, 59, and 87-2) are denied as moot.

2. Plaintiffs' motions for a preliminary injunction (Docs. 25 and 27) are denied as moot.

3. Plaintiffs' motion for partial summary judgment (Doc. 54) is denied as moot.

4. Plaintiffs' motion in limine (Doc. 82) is denied as moot.

5. Defendants' motion for a continuance (Doc. 87) is denied as moot.

6. The motion to quash subpoena (Doc. 89) is granted.

7. The motion to quash subpoena duces tecum (Doc. 93) is granted.

8. The previous Order (Doc. 79) setting trial dates is set aside and no trial will be conducted.

9. The motion of the State defendants to dismiss the claims under the Voting Rights Act of 1965 (Doc. 105-3) is granted since any such claims and claimed defenses are moot.

10. The motion of the State defendants (Doc. 103-1 and 103-2) is denied as moot.

11. The motion of the United States (Doc. 107) is denied.

12. The motion of Corson and Ziebach counties (Doc. 110) is denied.

13. The motion of the individual plaintiffs (Doc. 104) is denied.

14. The revised motion of the State defendants (Doc. 105-1 and 105-2 (a)) is granted and special primary elections and other election activities shall be conducted according to Exhibit A attached to this Order.

15. The revised motion of the State defendants (Doc. 105-2(b)) to only conduct a general election is denied.

16. The results of the primary election already conducted in what has been claimed to be District 28 are set aside, vacated and held for naught.

17. The redistricting action taken by the 1996 South Dakota Legislative Session is a nullity and Districts 28A and 28B as established in 1991 are the proper legislative districts as a matter of law.

18. The Court retains jurisdiction to entertain claims for attorney fees and costs.

Dated this 10th day of August, 2000.

BY THE COURT:

/s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK
BY: /s/ Barbara J. Pinkerton
DEPUTY
(SEAL)

EXHIBIT "A"

DISTRICT 28A AND 28B SPECIAL PRIMARY ELECTION

CALENDAR

August 11, 2000	earliest day for primary or independent candidates to circulate ad file nominating petitions. (SDCL 12-6-4.1, 12-7-1.1)
August 21-25, 2000	one notice of voter registration deadline – ARSD 5:02:04:04.
August 21-25, 2000	county auditors must publish one notice of deadline for filing nominating petitions – ARSD 5:02:04:17.
August 28, 2000	last day to file primary election nominating petitioners. (SDCL 12-6-4, 12-9-4)
	deadline for voter registration for the primary election. (SDCL 12-4-5)

August 29, 2000	drawing for position on the ballot for the primary election will be held in the office of the Secretary of State at 9:00 a.m. (SDCL 12-16-8)
August 28-September 1 & September 4-8, 2000	weeks in which county auditors must publish the notice of election – ARSD 5:02:04:16. (SDCL 12-12-1)
September 1, 2000	deadline for primary election ballots to be printed and in the auditors' possession. absentee voting may begin as soon as ballots are available. (SDCL 12-16-1, 12-16-17, 12-19-3)
September 8, 2000	deadline for publication of facsimile ballot. (SDCL 12-16-16)
September 12, 2000	**PRIMARY ELECTION DAY** (SDCL 12-2-1, 12-2-3) Polls are open from 8:00 a.m. to 7:00 p.m. local time.
	Last day for independent candidates to file nominating petitions with the Secretary of State. (SDCL 12-7-1)
September 13, 2000	last day for county canvass of returns. (SDCL 12-20-36)
	certified copies of the official county canvasses must be filed with the Secretary of State immediately following the official canvasses. (SDCL 12-20-38.1)
September 14, 2000	last day for convening the state board of canvassers. (SDCL 12-20-47)

September 15, 2000	last day for filing recount petition – ARSD 5:02:19:05. County auditors shall notify the Secretary of State of a legislative recount. (SDCL 12-21-11, 12-21-11.1, 12-21-12)
September 25, 2000	deadline for recount board of convene.
September 26, 2000	deadline for all general election ballots to be printed and in the auditors' possession. Absentee voting may begin whenever ballots are available. (SDCL 12-16-1, 12-16-17, 12-19-3)
October 10, 2000	deadline for special primary legislative candidates to file reports of receipts and expenditures with Secretary of State. (SDCL 12-25-13.3)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CHARLENE ALDEN, FRED BELLY MULE, HOLDA ROUNDSTONE, DANNY SIOUX, WILBUR SPANG, JAMES WALKS ALONG, PHILLIP WHITEMAN, JR., FLORENCE WHITEMAN, and LYNETTE TWO BULLS, Plaintiffs, vs. BOARD OF COUNTY COMMISSIONERS OF ROSEBUD COUNTY, MONTANA; GARY D. FJELSTAD, JOAN K. STAHL, and DANIEL D. WATSON, in their official capacities as members of the Board of County Commissioners of Rosebud County; and GERALDINE CUSTER, in her official capacity as Clerk and Recorder of Rosebud County, Montana, Defendants.	CV 99-148-BLG-DWM ORDER (Filed May 15, 2000)

Before the Court are the parties' proposed remedies for Rosebud County's conceded violation of § 2 of the Voting Rights Act, Pub. L. No. 91-285, 84 Stat. 314 (June 22, 1970), *codified at* 42 U.S.C. § 1973.

Redistricting Now vs. Redistricting After 2000 Census

Rosebud County contends that redistricting should be left to the Commissioners duly elected under the system that violates the Act. They argue that the doctrine of laches should prevent Plaintiffs from triggering redistricting before the mandatory redistricting that will follow the 2000 Census.

"A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997). That opportunity has been given in this case by Rosebud County's participation in it. The duly elected Commissioners are responsible for districting in the County. *See* Mont. Code Ann. §§ 7-4-2101 *et seq.* (1999). They have conceded that redistricting is appropriate. In settlement of the litigation, they agreed to adopt a single-member districting plan for Rosebud County. *See* Stipulation and Order of January 10, 2000.

What the Commissioners have agreed to by stipulating to redistricting is stated in *Thornburgh v. Gingles*, 478 U.S. 30 (1986). These are the "general legal principles relevant to claims that § 2 [of the Voting Rights Act] has been violated through the use of multi-member districts" (*id.* at 52):

> [U]nless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a block voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group. . . . These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a block to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Thornburgh, 478 U.S. at 49-51 (internal citations and footnotes omitted).

These factors are all that plaintiffs must show in order to establish a violation under § 2 of the Voting Rights Act. In *Thornburgh*, the Court's disquisition on the legal standard for showing racially polarized voting was necessary because the defendants contested the plaintiffs' claim that the current district configuration had the effect of diluting the black vote. By contrast, where a party stipulates that there is a reasonable basis for a finding of vote dilution and, jointly with its adversary, requests the Court to enter an order finding such reasonable basis and sanctioning the stipulation, there is no basis for that party to challenge a finding that § 2 is violated. *See id.* at 78-79 (concluding that whether § 2 has been violated is a question of fact reviewed for clear error, not a question of law reviewed de novo).

Therefore, in light of the stipulation and order entered on January 10, 2000, it is an established fact that the Rosebud County Commissioner Districts violate § 2 of the Voting Rights Act. Whether the Court adopts the plan proposed by the Rosebud County Commissioners or Plaintiffs' plan, or crafts a remedy of its own, it will "dispose[] of [the Commissioners'] claim not in the forbidden sense of cutting [them] off from a remedy to which [they are] entitled, but only in the legitimate sense of granting [them] an element of the very relief [they] sought." *Lawyer*, 521 U.S. at 579.

Thus, the only question before the court is the appropriate remedy, or more precisely, whether a remedy is due. The Commissioners argue that "It is clear that the defense of laches is available in this case, and, while defendants are not seeking to bar the plaintiffs' action, the equities underlying that defense should properly be

considered in conjunction with the remedies that the parties are proposing." This suggestion, that the doctrine of laches should apply not to bar Plaintiffs' action but only to bar their remedy, is legally unintelligible. If the principles of waiver and estoppel apply at all in this case, they preclude assertion of the defense of laches at this late stage of the litigation. The Commissioners agreed to proceed to the remedy stage, they agreed that single-member districts were the remedy, and no party dissented from settlement. These facts distinguish their case from those they cite, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *MacGovern v. Connoly*, 637 F.Supp. 111 (D. Mass. 1986), and *Fouts v. Harris*, No. 98-10031-Civ-Paine (S.D. Fla. 1999). The Commissioners had the opportunity to assert this defense or simply refuse to enter into any stipulations before the remedy stage. They chose not to do so.

Against this reasoning, the court should weigh the imperative that § 2 violations must receive a "full and complete remedy." "[A]ny illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

The Commissioners ask the Court to leave in place a system they agree is unfair for fear that change would be even worse. This possibility would be carefully considered by the Court, but the Commissioners have not produced any facts to indicate that the 1990 census is so inadequate that a remedy based on it is doomed to failure. Moreover, Mont. Code Ann. § 7-4-2102(1) compels the Commissioners to redraw district boundaries in light

of the 2000 census. Any remedy the Court imposes will be of brief duration.

Essentially, the Commissioners' stipulation puts the Court in the awkward position of either participating in the perpetuation of an unfair voting system or enforcing a tight schedule and perhaps certain unanticipated expenses to the County by requiring redistricting now. If the Commission is permitted to redistrict only after the results of the 2000 census are available, one commissioner will be forced to accept a two-year term, in direct contravention of Mont. Code Ann. § 7-4-2102(1) (1999).[1] The legal alternative is the better one.

Consequently, I will not accept the Commissioners' plan to postpone redistricting until the results of the 2000 Census trigger Montana's mandatory redistricting statute.

The Remedy

Plaintiffs submit two plans, A and B, both of which reduce the current 16.45% population differential between districts below 10%. Plan A yields a maximum differential of 8.68%, Plan B, 5.57%. The configurations

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[1] For the 2000 election of a commissioner from District 3, the Commissioners propose to keep in place the current at-large system. Then, in 2001, a new single-member districting plan will be forged. In 2002, commissioners from both District 2 (encompassing the Northern Cheyenne Reservation) and district 3 will be elected. The six-year commissioner terms would then be 're-staggered' by holding another election in District 2 in 2004.

under both plans are unremarkable; gerrymandering is not an issue.

Plaintiffs' proposal need not affect the term of any currently sitting Commissioner, because Joan Stahl's term expires in 2000 and that is the year the single-member redistricting plan would take place. Furthermore, redistricting, even shortly before mandatory redistricting, is permitted by Mont. Code Ann. § 7-4-2102(1) (1999): "In every county of the state, following each federal decennial census, the board of county commissioners shall divide their respective counties into three commissioner districts, as compact and equal in population and area as possible. Such apportionment may take place *at any time* for the purpose of equalizing in population and area such commissioner districts."

The commissioner elected in 2000 will participate in redistricting Rosebud County based on the 2000 census. Plaintiffs' proposal ensures that the commissioner will be elected under a fairer system than is currently in place. For these reasons, I will redistrict Rosebud County to implement the boundaries drawn in Plaintiffs' Plan B. However, unlike Plaintiffs' Plan B, the district encompassing the city of Colstrip shall be District 2, and the district encompassing the Northern Cheyenne Reservation shall be District 3.

In order to minimize disruption of Rosebud County's election administration, implementation of Plaintiffs' Plan B will proceed, in part, as if a vacancy existed in the new District 3. Because this order predates the primary election by less than 75 days, the primary election for District 3 Commissioner shall not be held. *See* Mont. Code

Ann. § 7-4-2106(3)(b) (1999). Instead, each political party shall nominate one candidate for the general election. Independents may file petitions with the County Clerk and Recorder on or before the 75th day prior to the general election. A new District 3 Commissioner shall then be elected at the general election on November 7, 2000. However, the current Commissioners shall not appoint anyone to fill the vacancy in the interim between the creation of the district and the general election, and current District 3 Commissioner Joan Stahl shall fulfill her term of office.

Accordingly, IT IS HEREBY ORDERED that, for a period of ten (10) days from the date of this Order, the parties shall have the opportunity to object to the implementation of this remedy. The remedy itself is not subject to objections or motions for reconsideration.

IT IS FURTHER ORDERED that, within twenty (20) days of the date of this Order, a certificate shall be prepared to reflect Plaintiffs' Plan B, except that Plaintiffs' District 2 shall be District 3, and Plaintiffs' District 3 shall be District 2. The certificate shali be dated and signed by the Honorable Gary Day, District Court Judge for the Sixteenth Judicial District, Rosebud County. The certificate shall then be filed in the Office of the Rosebud County Clerk and Recorder. *See* Mont. Code Ann. § 7-4-2103 (1999).

IT IS FURTHER ORDERED that, upon filing of the certificate, the Rosebud County Clerk and Recorder shall cancel the primary election for District 3 Commissioner, currently scheduled for June 6, 2000.

IT IS FURTHER ORDERED that this Order shall not affect the term of Joan Stahl, Commissioner for the current District 3, and that Stahl's term shall expire at the time it would have expired under the old districting plan.

IT IS FURTHER ORDERED that Gary Fjelstad, current District 1 Commissioner, shall remain District 1 Commissioner under the new districting plan. His term of office shall expire at the time it would have expired under the old districting plan.

IT IS FURTHER ORDERED that Daniel Watson, current District 2 Commissioner, shall remain District 2 Commissioner under the new districting plan. His term of office shall expire at the time it would have expired under the old districting plan.

IT IS FURTHER ORDERED that mandatory redistricting based on the 2000 Census shall not occur until the District 3 Commissioner elected in November is duly seated.

IT IS FURTHER ORDERED that Defendants' motion for a hearing (dkt # 32) is DENIED. Plaintiffs' motion to suspend candidate filing deadline (dkt # 36) is MOOT.

DATED this 9th day of May, 2000.

4:26 p.m.

/s/ Donald W. Molloy
DONALD W. MOLLOY
UNITED STATES
DISTRICT JUDGE